APPEAL NO. 040395
FILED APRIL 8, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on January 22, 2004. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the second, third, fourth, and fifth quarters.

The claimant appeals, contending that a functional capacity evaluation in evidence should be discounted; that the respondent's (carrier) required medical examination (RME) report is not credible "and is fraught with bias and prejudice"; that the claimant's treating doctor had submitted narratives which specifically explain how the injury causes a total inability to work; and that if the claimant has an ability to work he made a good faith job search each week of the fifth quarter qualifying period. The claimant also submitted a timely supplemental request for review submitting another report dated February 5, 2004, from the treating doctor reiterating the doctor's opinion that the claimant remain in an off work status. The carrier responds, urging affirmance.

DECISION

Affirmed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The SIBs criterion in issue is whether the claimant made a good faith effort to obtain employment commensurate with his ability to work during the qualifying periods for the second through fifth quarters. The direct result criterion was decided in the claimant's favor and has not been appealed.

First, addressing the additional reports both dated February 5, 2004, the Appeals Panel generally only considers evidence that was submitted into the record at the CCH. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider the standard set out in Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In this case the reports of Dr. M, the claimant's treating doctor, are cumulative of other reports dated November 22, 2002, December 3, 2002, March 14, 2003, a note dated July 3, 2003, and an attached Work Status Report (TWCC-73) dated July 10, 2003, report of August 21, 2003, and November 13, 2003. We do not believe a remand is warranted to consider the additional reports.

The claimant contends that he had no ability to work during the qualifying periods in dispute. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a

narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. The hearing officer determined that during the qualifying periods at issue the claimant possessed an inability to work. That determination involved a fact question and is supported by the evidence. The hearing officer also found that the claimant did not present a narrative report from a doctor which specifically states how the claimant's compensable injury resulted in an inability to work. Our review of Dr. M's reports, listed above, indicates that the hearing officer's determination on this point is against the great weight of the evidence. Dr. M's reports, taken collectively, support the claimant's contention that in Dr. M's opinion the claimant has a total inability to perform even sedentary to light work. That opinion however is rebutted by the report of the carrier's RME doctor and to a certain extent by the claimant's own testimony. Although the claimant has provided a narrative which specifically explains why in Dr. M's opinion the claimant's injury causes a total inability to work, the hearing officer's other findings support the determination that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work pursuant to Rule 130.104(d)(4).

The claimant also contends that if we affirm the determination that he has an ability to work, that during the fifth quarter qualifying period (the claimant, at least on appeal, concedes that he had not made or documented the requisite job searches for the second through fourth quarter qualifying periods) he satisfied "the [Texas Workers' Compensation Commission] [r]ules in performing job searches each week of the qualifying period." Rule 130.102(e) provides in part that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. The claimant submitted documentation of some 68 job contacts during the qualifying period (one each day, Monday through Friday each week). The carrier challenged the job contacts as being largely unverifiable and asserted that the claimant sabotaged his job searches by telling the prospective employers that he had had spinal surgery and had not been released by his doctor to return to work. While the hearing officer determined that the claimant conducted a job search every week of the qualifying period of the fifth quarter, she found that the job searches were not done in good faith.

The hearing officer is the sole judge of the weight and credibility of the evidence, Section 410.165(a), and she may believe all, part, or none of the testimony of the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). In this case the hearing officer was able to not only listen to the testimony but was able to observe the claimant and his demeanor. As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, the hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TRANSCONTINENTAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Margaret L. Turner
Appeals Judge

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Edward Vilano
Appeals Judge